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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 522

HERCULES MINING COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for Idaho (R. 25–32) is reported in 34 F. Supp. 103. The opinion of the Circuit Court of Appeals (R. 146–152) is reported in 119 F. (2d) 288.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1941 (R. 153), and the order denying the petition for rehearing was entered on June 9, 1941 (R. 154). The petition for writ of certiorari was filed on August 18, 1941. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, during the taxable years, the petitioner was carrying on business within the meaning of Section 701 (a) of the Revenue Act of 1934 and was thus subject to a capital stock tax.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 9–12.

STATEMENT

The pertinent facts as found by the District Court are as follows (R. 33–42):

Petitioner, organized in 1923 under the laws of Delaware for the purpose of engaging in mining, carried on extensive mining operations prior to 1926. When the ore body became exhausted in 1925, petitioner spent considerable money in exploration and development on its property, but these activities proved unsuccessful and were abandoned prior to 1933 (R. 33–34).

After it ceased mining, petitioner used its milling and concentrating facilities by operating a custom mill for treating ore from other mines. But such milling was temporarily discontinued in 1932 because of the decline of prices for base metal. During the latter part of 1935, petitioner leased its

milling facilities and operations were carried on by the lessee for about a year. In May 1937, petitioner resumed, and since that time has continued, its custom milling (R. 34–35).

Petitioner is the owner of large underground workings and much mining equipment and machinery located both underground and on the surface. It also owns a number of dwelling houses, formerly occupied by employees, and has a building which has apartments for light housekeeping. For watching and maintenance of its property, petitioner spent $37,621.52 during the year ending June 30, 1934, and $32,750.54 during the year ending June 30, 1935 (R. 35–36). In addition, petitioner also spent $5,526.33 and $6,134.39 for office, legal, and general expenses in these two years respectively (R. 37). Petitioner also paid $534.99 to its president in the second taxable year as reimbursement for expenses incurred in connection with examination of mining property, and in the same year $393.37 was paid to one of the directors on a final accounting made for the purchase of stocks of other corporations in 1928 and 1929 (R. 40).

Petitioner's working capital and surplus funds were invested during the years in question in bonds and time certificates of deposit. These investments required attention since the income from them had to be collected and such income as well as the pro-

ceeds from matured bonds were reinvested. The petitioner also had a large investment in the stock of a newspaper in Wallace, Idaho, and in the stock of several inactive subsidiary companies. It was obliged to retain an office force to keep the corporate records of the latter companies and to provide supervision of their management (R. 36–37, 97).

Petitioner's gross income for the year ending June 30, 1934, amounted to $31,482.81 and for the year ending June 30, 1935, to $28,903.14. The major part of this income was received as interest but some was for rent on its buildings and in payment for old equipment which was sold (R. 37). Small amounts were also received for royalties from the occasional sale of ore mined by its employees (R. 39).

All work necessary to protect the property of petitioner's subsidiaries was carried on by it and the expenses for such work were charged to the subsidiaries at cost. Petitioners also made occasional loans to its subsidiaries without interest (R. 38).

When it closed its mill, petitioner had large quantities of fuel oil which it sold to its employees at cost, and when the supply was exhausted, further purchases were made and also sold at cost. This practice, however, was soon discontinued. Liberty Bonds of a par value of $23,000 were also sold during the taxable year at a profit of $228.81. (R. 39–40.)

Petitioner paid $1,110.33 for capital stock tax, interest and penalties for the year ending June 30, 1934, and $1,050.51 for the year ending June 30, 1935, after its timely claim for exemption had been denied by the Commissioner. The petitioner subsequently filed a claim for refund which was also rejected (R. 41–42).

The District Court held that the petitioner was not carrying on business within the meaning of the capital stock tax law (R. 43). The Circuit Court of Appeals reversed the decision of the District Court (R. 153).

ARGUMENT

Section 701 of the Revenue Act of 1934 (Appendix, *infra,* p. 9) imposes a tax on a domestic corporation "with respect to carrying on or doing business." "Business" is a very comprehensive term, *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171; and a company's activities and organization must be judged as a whole to determine whether it is engaged in "business." *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 455–456.

Under these general principles petitioner was carrying on or doing business during the taxable years. Although it did not actually engage in mining or milling during the period, petitioner did not at any time indicate any intention to abandon its pursuit of gain. On the contrary, petitioner put its property to uses which either to a limited extent

yielded some immediate profits or which, to a greater degree, would enable it to enjoy future profits when it resumed its original activities. Pursuant to this plan petitioner kept an adequate office force and other employees; it kept the records for its subsidiary companies and managed their affairs; it loaned money to these companies; it invested and reinvested its fund and income therefrom in bonds and certificates of deposits; it sold some Liberty Bonds at a profit and made sales of some of its personal property; it leased some of its buildings and collected the rents from them; it kept its extensive property in good condition by making many repairs; it gave mining leases to former employees and collected small royalties upon the occasional sale of ore produced under the leases; its president made one inspection trip of mining property in California; and it met various obligations. It is immaterial that petitioner operated at a loss during these years since the ultimate objective of its activities and organization was eventually to realize gain. Contrary to petitioner's contention, therefore, the decision below is entirely consistent with the principle announced by this Court in *Edwards* v. *Chile Copper Co., supra,* and *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503.

Petitioner further urges that the decision below conflicts with the decisions of this Court in *McCoach* v. *Minehill & S. H. R. Co.,* 228 U. S. 295, and *United States* v. *Pyne,* 313 U. S. 127, and with

the decisions of several circuit courts of appeals.[1] But in cases of this type, the decision in each instance must depend upon the peculiar facts before the court, *Von Baumbach* v. *Sargent Land Co.*, *supra*, at p. 516, and upon the particular statutory provisions involved. *Higgins* v. *Commissioner*, 312 U. S. 212, 217.

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[1] The cases cited as in conflict with the decision below are *Rose* v. *Nunnally Inv. Co.*, 22 F. (2d) 102 (C. C. A. 5), certiorari denied, 276 U. S. 628; *United States* v. *Three Forks Coal Co.*, 13 F. (2d) 631 (C. C. A. 3); and *United States* v. *Hotchkiss Redwood Co.*, 25 F. (2d) 958 (C. C. A. 9). But these cases presented differing facts. In any event, later decisions of the same and other courts establish the varying circumstances in which a corporation may be held to be subject to the tax and support a conclusion that petitioner here was doing or carrying on business. See *Lyon Lumber Co.* v. *Harrison*, 113 F. (2d) 443 (C. C. A. 7); *American Investment Securities Co.* v. *United States*, 112 F. (2d) 231 (C. C. A. 1); *United States* v. *Peabody Co.*, 104 F. (2d) 267 (C. C. A. 6); *Page* v. *M. Rich & Bros. Co.*, 99 F. (2d) 607 (C. C. A. 5); certiorari denied, 306 U. S. 662; *United States* v. *Atlantic Coast Line Co.*, 99 F. (2d) 6 (C. C. A. 4), revised on rehearing, 99 F. (2d) 932, certiorari denied, 306 U. S. 645; *New Haven Securities Co.* v. *Bitgood*, 87 F. (2d) 759 (C. C. A. 2); and *Harmar Coal Co.* v. *Heiner*, 34 F. (2d) 725 (C. C. A. 3), certiorari denied, 280 U. S. 610.

CONCLUSION

The court below correctly applied established principles to the special facts in this case. The petition should be denied.

Respectfully submitted.

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